United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

485

BRIEF FCR APPELLANT AND INDEX

UNITED STATES CCURT CF APPEALS

For the District of Columbia Circuit

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No. 22,109

Rossi Butler, Jr.
Appellant

v.

United States of America
Appellee

Appeal From Conviction of the United States District Court
for the District of Columbia On a Charge of Assault
With a Dangerous Weapon

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(Appointed by This Court)

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TABLE OF CITATIONS

Cases:

QUESTION PRESENTED

Was the trial of Defendant so prejudiced by inadequate identification, inadequacy of counsel and misjoinder of counts so as to deny him the due process of law guaranteed him by the Constitution of the United States?

(This case has not been previously before this Court.)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 22,109

Rossi Butler, Jr.,
Appellant

v.

United States of America,
Appellee

Appeal from Conviction and Sentence of the United States District Court for the District of Columbia on a Charge of Assault with a Dangerous Weapon

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal in forma pauperis from a conviction on a charge of assault with a dangerous weapon from the United States District Court for the District of Columbia, 28 U.S.C. 1291.

STATEMENT OF THE CASE

On or about 9 p.m., Friday, November 3, 1967, in general vicinity of an alley in the 1300 block between Corcoran and R Streets,

in the Northwest section of D.C., assault was allegedly committed upon D.C. fireman Edward L. Shymanski and James R. Tanner. At approximately 11 a.m. Thanksgiving morning, the 23rd of November, 1967, two officers of the District of Columbia Metropolitan Police escorted one of the complaining witnesses, Mr. Tanner, to the defendant, Mr. Butler's residence for the purpose of identification. The complaining witness, Mr. Tanner, was driven directly from the Police station to Mr. Butler's residence and then back to the Police station with no visits to any other suspects' residence. Mr. Butler's counsel was not present at this identification.

On the morning of November 24, 1967, Mr. Tanner swore to a warrant which was then issued for the arrest of the defendant, Rossi Butler, Jr.

Mr. Butler was subsequently arrested and released in his own recognizance pending trial.

At the trial, the U.S. Attorney joined two counts of assault, one on the person of Mr. Shymanski and the other on the person of Mr. Tanner, even though the prosecution had no evidence to connect Mr. Butler with the assault on Mr. Shymanski.

At the trial, an "in court identification" was made by Mr. Tanner of the defendant, Rossi Butler, Jr., as his assailant. However, no such identification could be made by Mr. Shymanski.

Mr. Tanner's identification was based primarily on the pre-trial confrontation on Thanksgiving morning at Mr. Butler's residence.

At the trial, Mr. Butler's mother and sister testified that Mr. Butler was at home for the entire evening. Their testimony was based primarily upon their recollection of an incident that occurred in the hallway of their home on the night in question at approximately the same time as the alleged assault on the firemen.

At trial, Mr. Butler, the defendant, was acquitted of assault on the person of Mr. Shymanski and convicted of assault on Mr. Tanner. The defendant, Rossi Butler, Jr., was then sentenced to 3 to 9 years in prison.

ISSUES RAISED ON APPEAL

I. Was the defendant denied due process of law in that his counsel was not notified nor present at the time of the pre-trial confrontation with the complaining witness?

II. Did the defendant have adequate counsel as guaranteed by the Sixth Amendment to the Constitution of the U.S.?

III. Was the trial jury adversely prejudiced by the atmosphere and conduct of the trial?

SUMMARY OF ARGUMENT

The appellant, Rossi Butler, Jr., was denied due process of the law in that his right to counsel under the Sixth Amendment of the Constitution of the United States was violated by the pre-trial confrontation between appellant and complaining witness without the presence of or notification to appellant's counsel and subsequent failure to object to in court identification testimony which should have been properly excluded under the Wade and Gilbert rules.

The prosecution prejudiced the jury against the defendant by the joining of the indictment as to Mr. Shymanski who was actually injured, with the indictment as to Mr. Tanner who was not, in fact, touched.

The trial and sentencing of the appellant were conducted in a prejudicial atmosphere as indicated by statements from the court during the trial and at the sentencing.

Since appellant has been denied his Constitutional right to adequate counsel under the Sixth Amendment to the United States Constitution and since appellant was adversely prejudiced by the joining of the indictment in a single trial and by the atmosphere of the trial, the conviction of the lower court should be reversed.

ARGUMENT

I. APPELLANT WAS DENIED DUE PROCESS OF THE LAW IN THAT HE DID NOT HAVE ADEQUATE COUNSEL AND HIS COUNSEL WAS NOT NOTIFIED, AND, IN FACT, WAS ABSENT AT THE TIME OF THE PRE-TRIAL CONFRONTATION WITH A COMPLAINING WITNESS.

There is a great potential for prejudice, intentional or not, in pre-trial line-ups, which may not be capable of reconstruction at trial, and in a sense, presence of counsel itself can often avert prejudice and insure meaningful confrontation at trial. There can be little doubt that for appellant the confrontation with the complaining witness in the hallway of appellant's residence on Thanksgiving morning 1967 was a critical stage of the prosecution at which he was as much entitled to counsel as at the trial itself. United States v. Billy Joe Wade, 87 Sup. Ct. 1926 (1967).

As a result of the confrontation with the complaining witness in the case at bar, appellant's right to adequate counsel as guaranteed by the Sixth Amendment to the United States Constitution was violated. First, the police drove a witness directly to appellant's residence with no intervening stops and with no intent to even make any pretense to a fair line-up. The witness was clearly prejudiced in that it was obvious to him that the police felt that appellant was the perpetrator of the assault and that they had no other suspects in mind. With this background and the high content of suggestion contained in the situation,

appellant had no real opportunity for a fair confrontation of the complaining witness at the trial when his counsel was present since the witness had formed his opinion based upon the confrontation on Thanksgiving morning.

In Stovall v. Denno, 87 Sup. Ct. 1967 (1967), the Supreme Court in interpreting their earlier decision in the Wade case said: "Line-up identification testimony should be excluded if it was obtained by exhibiting an accused to identification witnesses before trial in the absence of counsel." That is exactly the situation that has occurred in the instant case. Appellant's counsel was not notified nor was he present at the confrontation between Mr. Tanner and the defendant on Thanksgiving morning. Appellant's right to counsel under the Sixth Amendment to the United States Constitution as interpreted by the Supreme Court of the United States in the Wade and Stovall cases was violated by the Police in the investigation and prosecution of the instant case.

II. THE TRIAL AND SENTENCING OF APPELLANT WERE CONDUCTED IN A PREJUDICIAL ATMOSPHERE.

The testimony of the witnesses at trial indicated that the assailant, or assailants, responsible for the assault on Mr. Shymanski and the assault on Mr. Tanner was, or were, a member or members of a group of individuals who appeared in the vicinity of the fire on the

night of the incident. There was no positive identification of the appellant as the individual who struck Mr. Shymanski and there was no real case against appellant concerning that assault in that he was acquitted on that charge. However, the joining of the two counts prejudiced the jury by showing that an actual attack had been made on Mr. Shymanski and even though it was not proved that appellant perpetrated that assault, it is very likely that the jury was prejudiced against him by the evidence presented at trial concerning the attack on Mr. Shymanski. It is highly questionable whether appellant would have been convicted of any assault at all if it were not for the prejudicial evidence presented on the first indictment concerning Mr. Shymanski. And, further, it is certainly questionable whether appellant would have been sentenced to 3 to 9 years if the only evidence presented was that Mr. Tanner was threatened by an assailant holding a rock or brick, but was not in fact, touched or struck.

The comments by the court, as indicated by the quotations from the record contained in Appendix A, clearly show the climate in which appellant was tried and sentenced.

Appellant was found innocent of the attack on Mr. Shymanski. Yet, the sentence imposed is much more than that required by the conviction on Count II, the alleged assault on Mr. Tanner.

It is very likely that appellant's conviction and heavy sentence were the result of the prejudicial climate created by the misjoining

of the two assault counts and the charged emotions wrought by the presentation of evidence regarding the beating of Mr. Shymanski.

CONCLUSION

Since appellant's right to adequate counsel under the Sixth Amendment to the Constitution was violated in the pre-trial confrontation without counsel and in the preparation of trial counsel and, further, that appellant was prejudiced at trial by the joining of the two indictments when there was no prima facie case against him as to the assault on Mr. Shymanski, it is submitted that appellant was denied due process of the law and that his conviction should be reversed and that appellant should be released from custody.

Respectfully submitted,

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Attorney for Appellant
(Appointed by This Court)

APPENDIX A

Excerpts of statements of Trial Judge at conclusion of trial and during sentencing.

* * *

THE COURT: . . . "Now that the defendant has been found guilty by the jury on the second count, the Court can consider dangerousness to the community in determining whether or not this defendant should be released on personal recognizance or conditions.

These vicious attacks by packs or gangs on individuals has just somehow got to be stopped. As I have said so frequently, I can understand two people fighting, but five to ten people jumping one person isn't even acting like a human being, it is acting like a bunch of beasts whatever else they might be, or wolves in the north.

Therefore, this defendant is deemed to be a danger to the community, and with which no reasonable conditions of release would protect the community, and I will commit the defendant and order a pre-sentence report." (Transcript pp. 149-150)

* * *

THE COURT: "Well, this is another of these senseless, brutal assaults that take place in the District of Columbia. In this case I recall the testimony, the firemen are coming out of an alley in a fire truck after extinguishing a fire. A man comes running up the street covered with blood and goes over the hood of the fire engine. The

firemen take the man and start trying to render first aid and up comes a gang, including this defendant, who was apparently the leader of the group, and to pay the firemen for their good samaritan conduct, this defendant starts attacking the fireman with a rock, and it is only by the grace of the Lord that he didn't kill one of them, and he acted like a nazi storm trooper might in the 30's in Germany.

I don't see that the Youth Corrections Act is fitted for this kind of an individual.

It is the judgment of this Court that on count two you be imprisoned in a place of confinement to be designated by the Attorney General of the United States or his authorized representative for a term of not less than three and not more than nine years. The foregoing sentence on count two to be served consecutively to any sentence imposed prior to this date by any court in this or any other jurisdiction, state or Federal" . . . . . .

* * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,109

ROSSI BUTLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DAVID C. WOLL,
Assistant United States Attorneys.

ISSUES PRESENTED *

In the opinion of the appellee the following issues are presented:

1) May appellant challenge for the first time on appeal the out-of-court identification of him by the complaining witness on right to counsel or due process grounds? If so, considering the totality of the circumstances in this case, was the identification procedure employed herein such that appellant was entitled to have counsel present or so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification?

2) Was appellant denied effective assistance of counsel by counsel's failure to object to the in-court identification of appellant by Tanner as tainted by the alleged wrongful out-of-court identification?

3) Did the trial judge commit plain error in not ordering a severance of the counts of the indictment for trial where no motion for severance was made?

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* This case has not been previously presented to this Court under the same or similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,109

ROSSI BUTLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A two-count indictment filed January 17, 1968, charged appellant with assault with a dangerous weapon in violation of 22 D.C. Code § 502 (1967). Appellant was found not guilty on count one (as against complainant Edward L. Shymanski) and guilty on count two (as against complainant James R. Tanner) and was sentenced to 3 to 9 years imprisonment.

The facts elicited from Government testimony are as follows:

On the evening of November 3, 1967, complainants, Privates Edward L. Shymanski and James R. Tanner of En-

gine Company No. 6, D.C. Fire Department, were in the alley in the rear of 1340 R Street, N.W., where they had responded to a fire (Tr. 4). At that time, they were assigned to a fire truck (6 Engine), Tanner as the driver and Shymanski as the small lineman assigned to the rear of the truck (Tr. 40-41). When the fire was over, Tanner began driving 6 Engine, with Captain Harry E. Gates next to him and Shymanski on the back step of the truck, out of the alley. (Tr. 55). As the truck neared the mouth of the alley which emptied into Corcoran Street, an unidentified male subject, his face full of blood, jumped on the hood of the truck and said he had been beaten and robbed (Tr. 5, 56). Captain Gates called on the radio for an ambulance and police and then opened the door of the truck and hollered back to Shymanski to bring the first aid kit. Captain Gates was about to render first aid to the man when, according to Gates, the man jumped up, climbed up on the truck and appeared to be looking for an ax. The man then fled from the vehicle and ran east on Corcoran Street, pursued by a group of men, who were throwing rocks and bricks at him. (Tr. 57-59). Private Tanner testified that the injured man jumped up, while Captain Gates was attempting to render first aid to him, ran over to Tanner's (driver's) side of 6 Engine and asked for an ax. At that time, according to Tanner, the appellant appeared on the right side of the truck with a rock in his hand (Tr. 6-7). The injured man then jumped off the truck and ran east on Corcoran Street pursued by approximately 10 men (Tr. 9). Captain Gates testified that as the injured man started to run east on Corcoran Street, Gates observed another man, whom he was unable to identify, climbing upon the truck with a brick or rock in his hand. (Tr. 57). Gates lost track of the unidentified man at that point because he turned to see where the injured man had run (Tr. 59-60). Also, at that time, Gates noticed three additional men near him with rocks or bricks in their hands. (Tr. 59). Captain Gates went back to the radio in the truck to request further help, returned to the front of the truck and looked east on Cor-

coran Street in the direction that the injured man had fled, when he saw several men attempting to take the axes off the aerial ladder truck (No. 4 Truck), which was parked a short distance east of the alley on Corcoran Street. When Captain Gates attempted to remove one of these men from No. 4 Truck, he was thrown on the ground and two or three men were on top of him. (Tr. 60). Subsequently, Gates felt himself free, got to his feet and observed Shymanski lying nearby in a pool of blood and in an unconscious state. (Tr. 61). Gates then noticed about seven men closing in on him, one man having a large rock over his head, when a police car came toward them on Corcoran Street. At this time the men turned and fled. (Tr. 61-62).

Tanner testified that Private Shymanski and he were standing at the side of No. 4 Truck when he heard someone holler that "(t)hey're trying to get the axes off the apparatus." Private Shymanski then went around the front of No. 4 Truck while Tanner went around the back of the same vehicle. As Tanner came up the other side of the vehicle "where all the hollering was going on," he found Shymanski lying face down in the street, "bleeding very badly." (Tr. 9-10). Tanner then bent over Shymanski, observed that he was unconscious and started to return to No. 6 Engine for the first aid kit. At that point, appellant came from behind Tanner, followed him to No. 6 Engine and threatened him with an object the size of a brick, stating, in Tanner's words, "Did I want the same thing he had given my friend." (Tr. 10-12, 23-25). When Tanner reached No. 6 Engine, he climbed into the truck to call for another ambulance and picked up a first aid kit and a clawbar for possible defense against appellant, who had proceeded up to the door of the truck. (Tr. 12). At the time Tanner started to exit from the truck with his first aid kit and clawbar, appellant, along with a group of other persons, who were in the immediate area, fled from the scene. Tanner testified that "they seemed to be all together because when the fight broke out, we found the Captain on the ground" (Tr. 15-16).

Tanner then proceeded back to the vicinity of No. 4 Truck to render first aid to Shymanski. (Tr. 27).

Officer Shymanski testified concerning his observation of the injured man and that he was told to get a first aid kit. He went to get the kit and upon his return, he saw the boots of a fireman, who was lying on the ground with several men on top of him. He observed that the fireman under attack was Captain Gates. (Tr. 39-42). Shymanski went over to assist Gates and grabbed several of the assailants from Gates when Shymanski was hit on the left side of the face, rendering him unconscious. He never saw the person that hit him, but did identify appellant as one of the persons standing over Captain Gates. (Tr. 44). At that point, Shymanski testified, appellant was from three to five feet away from him. Shymanski grabbed several people but appellant was not one of those persons grabbed (Tr. 45, 47). Shymanski never saw appellant again until December 15, 1967, in the Court of General Sessions.

The Government entered a hospital report into evidence which indicated that Shymanski suffered a "laceration of the upper left eyelid," with "tenderness impression to left auxiliary area" . . . . with a diagnosis of "possible skull fracture." (Tr. 66).

Officer Tanner also testified on cross-examination concerning his later identification of appellant at the latter's home at 1429 Q Street, N.W. (Tr. 27). According to Tanner, on November 23, 1967, he was told by several Metropolitan Police officers that "they had some juveniles they wanted me to look at to see if I could identify." (Tr. 34). The first place the officers took him was appellant's residence at 1429 Q Street, N.W. The officers instructed Tanner that if he "could identify *anybody* not to say anything, for me not to say a word, just come on out and when we got out in the car they asked me could I identify *anybody*, and I told them." (emphasis added). (Tr. 33-34). Tanner stated that he entered the hallway of appellant's apartment building with the police officers; that appellant, appellant's mother and teenage brother came from the apartment into the hallway and conversed for a

few moments with the police officers, and that Tanner said nothing until he left the building. The entire transaction took about three minutes. (Tr. 27-33). When they left the building and returned to the car, Tanner told the police that he couldn't identify the teenager but that appellant "was the one that night. . . ." (Tr. 34). Later, Tanner learned that the man he had identified was named Rossi Butler (Tr. 32), and on the next day (November 24) a warrant against appellant was lodged. (Tr. 29).

Tanner's testimony concerning the visit to appellant's abode was substantially corroborated by the testimony of appellant. Appellant testified that on November 23, detectives came to his home with a fireman and that he and his 16 year old brother, Allen, talked to the police in the hall outside their apartment (Tr. 115-117, 123). He also testified that several days later he received a call from a detective from No. 2 Precinct informing him that a warrant was outstanding against him and that he should surrender himself at the precinct. (Tr. 118).

Upon conclusion of the Government's case, appellant raised no motions for acquittal but presented his evidence, which consisted of alibi testimony. Appellant, his mother, and his sister testified that appellant was home during and shortly after the assaults on the firemen.

The jury returned with a verdict of not guilty as to the alleged assault on Private Shymanski and guilty as to the alleged assault on Private Tanner. (Tr. 147).

ARGUMENT

I. Appellant may not attack, for the first time on appeal, the out-of-court identification of him by Tanner on right to counsel or due process grounds. In any event, the record clearly shows that the identification procedure employed herein did not deprive appellant of any right to counsel or due process of law.

(Tr. 8, 12, 13-14, 33-34, 115-116)

Appellant complains for the first time on appeal that the complainant Tanner's in-court identification of appel-

lant should have been excluded on the alleged grounds that it was the product of an out-of-court identification procedure which offended appellant's right to have counsel present and apparently his right to due process of law. This contention should be rejected both because it was not raised below and because it lacks merit.

No attempt was made by appellant to exclude Tanner's identification of him at trial on any ground. No objection was made when Tanner positively identified appellant in court as the person who assaulted him. Indeed, the fact of and the circumstances surrounding the pre-trial identification were brought out by appellant on cross-examination in an unsuccessful effort to discredit Tanner's courtroom identification and to create a reasonable doubt that appellant was a participant in this crime.

Having failed in his sole purpose in exploring this evidence at trial, appellant may not now, for the first time on appeal, object to the admissibility of this evidence. Since no such motion was made at trial, the Government has been deprived of an opportunity to fully defend the propriety and fairness of the identification procedure with facts and argument or to establish the independent basis for Tanner's identification. See e.g. *Schmerber* v. *California*, 384 U.S. 757, 765 n.9 (1966); *Fuller* v. *United States*, No. 19,532, D.C. Cir., November 20, 1967, at 24-25; *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

The absence of such a motion is heightened when it is considered that the trial was conducted almost a year after the *Wade* and *Stovall* cases.[1] In *Wright* v. *United States*, No. 20,153, D.C. Cir., January 31, 1968, a claimed violation of due process of law in the conduct of a confrontation caused this Court to remand for a full hearing, even though the contention was not raised at trial. However, in that case the Court ruled that since the trial occurred pre-*Stovall*, "our disposition is uninhibited by the require-

[1] *United States* v. *Wade*, 388 U.S. 218 (1967); *Stovall* v. *Denno*, 388 U.S. 293 (1967). Appellant's trial occurred on May 10 and 13, 1968; *Wade* and *Stovall* were decided on June 12, 1967.

ment that issues proffered on appeal must normally be raised and decided initially in the trial court." P. 6 (n.b. n.22).[2] Such is not the circumstance in the present case.

In any event, the record herein clearly does not support a contention that the identification procedure conducted in this case was such that counsel for appellant was required to be present at the confrontation. In *United States* v. *Wade*,[3] the Supreme Court held that a post-indictment lineup is a "critical stage" in the criminal process at which the presence of counsel is required.[4] In that case, and its companion case, *Gilbert* v. *California*,[5] appellants were involved in lineups "held at substantial intervals after arrest, indictment, and appointment of counsel, but without counsel present."[6] In commenting upon the Supreme Court's holding in *Wade* and *Gilbert*, this Court stated:

> It would appear, however, that the Supreme Court has, at the least, cast an unmistakable shadow across those *post-arrest* single confrontations at the police station where formal lineups are a feasible alternative. For the future, of course, all such *post-incarceration* exposures, singly or in lineup, are subject to the protections of the Sixth Amendment right to counsel. . . .[7] (Emphasis added).

In the present case, however, confrontation between Tanner and appellant occurred before appellant was placed in custody and more significantly, before the police had probable cause to arrest appellant. That the police

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[2] But see *Adams* v. *United States*, —— U.S. App. D.C. ——, 399 F.2d 574, 575 n.1 (1968).

[3] *Supra* note 1.

[4] 388 U.S. at 237.

[5] 388 U.S. 263 (1967).

[6] *Clemons et al.* v. *United States*, Nos. 19,846, 21,001, 21,249, D.C. Cir. *(en banc)*, December 6, 1968, at p. 3.

[7] *Ibid*, at p. 8.

were merely in the investigatory phase of the alleged crime and needed identification in order to make any arrests is clear from the testimony of Tanner in redirect examination that the police wanted him to view different juveniles to see if he could identify anybody. (Tr. 33-34). At any rate, it is evident that the police felt that they lacked sufficient evidence to arrest appellant and needed identification of him to establish grounds for arrest.

In such a posture, a normal police lineup at a stationhouse was out of the question. It is well established that investigatory detention of a suspect for purposes of lineup identification cannot be tolerated. *Adams* v. *United States, supra* at pp. 577-578 of 399 F.2d; *Gatlin* v. *United States*, 117 U.S. App. D.C. 123, 130, 326 F.2d 666, 673 (1963); *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 370, 262 F.2d 465, 467 (1959). Thus the point of departure of the present situation from the holdings in *Wade* and *Gilbert* must be the lack of custody and control that the police enjoyed over appellant to arrange a police station lineup, with the consequent right of counsel to be present.[8]

The focus of the right to counsel at pre-trial confrontations holdings of *Wade* and *Gilbert* were examined by this Court in considering a confrontation occurring post-*Wade* in *Russell* v. *United States*, No. 21,571, D.C. Cir., January 24, 1969. While this Court acknowledged that the Supreme Court "spoke in broad terms," it went further to state that the confrontations disapproved in *Wade* and *Gilbert* were post-indictment lineups and that:

> The (Supreme) Court was evidently focusing primarily on the *routine* lineup and show-up procedures

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[8] Cf. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Under these decisions a confession is inadmissible as evidence if the court determines it was made while the defendant was in "custody or otherwise deprived of his freedom of action in any significant way" unless the defendant had the benefit of counsel or the four Miranda warnings. *Miranda* v. *Arizona, supra*, at 444.

> employed by the police to obtain evidence for use at trial. The Court was concerned both to enhance the fairness of such procedures and to expose to judge and jury any elements of unfairness or unreliability which might attend them. In these *typical* cases, where counsel had been retained and time was not a factor, it could find 'no substantial countervailing policy considerations . . . against the requirement of the presence of counsel'. At p. 6 (Emphasis added).

Certainly, in such a context, the present case cannot be termed typical when appellant, at the time of identification, was not under arrest, was not under any control of the police, had no charges placed against him and the police were obviously in an investigatory, rather than an accusatory, phase of the case. To encompass the above situation within *Wade* to require that the police arrange for counsel to be present at the moment of confrontation would be an "exercise in stultification." [9]

This Court recognized in *Clemons, supra* that "there are possible variations in the circumstances of arrest and detention where the right to counsel, as well as the demands of due process, will have to be defined and measured from case to case by reference to the *reasonableness of the police conduct under the particular circumstances.*" At p. 10. (Emphasis added). The reasonableness of the police conduct in the present case is clear. In order to make any legal arrest in the case, identification by the complainant had to be made. The police could rightly conclude that the only means available was confrontation at the appellant's house, and that efforts to assure the presence of counsel at the moment of confrontation were not only impractical but detrimental to proper police investigation.

Appellant argues that he was wrongfully prejudiced by Tanner's identification in that "it was obvious to (Tanner) that the police felt that appellant was the perpetrator of the assault and that they had no other suspects in

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[9] *Russell* v. *United States, supra* (concurring opinion) at p. 11.

mind." [10] Such a contention finds no support in the record. In fact, the testimony of Tanner concerning the circumstances of the confrontation, which was substantiated in part by appellant's own testimony, refutes the claim. Tanner testified that he was told by the police that they wanted him to look at juveniles to see if he could identify *anybody* and that appellant's residence was the first place they visited; that the police instructed him to say nothing while inside appellant's residence but to indicate later whether he could identify *anybody;* that he didn't know the appellant's name until after he identified appellant and that he told the police afterwards that it wasn't the juvenile in the hall (appellant's 16 year old brother) that he recognized, but rather appellant. Thus it is clear that even if the police suspected appellant, their suspicions were not conveyed to Tanner.

Applying *Stovall* to the above situation, especially in view of the fact that appellant was not singly confronted by Tanner,[11] no claim can be made that the pre-trial confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification that (defendant) was denied due process of law." [12] It is also apparent from the record that Tanner's in-court identification had independent sources. Tanner testified that the floodlights on No. 6 Engine "lit the alley up like daytime," (Tr. 8),

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[10] Appellant's brief, p. 5.

[11] Appellant corroborated the fact that during the period of confrontation, his brother, Allen, and he were present in the hallway, talking to the police (Tr. 115-116). This Court has adopted the characterization of *Stovall* as directed "primarily toward *single* suspect confrontation wherein a witness is presented with *one individual* and asked if he can make an identification" *Clemons* v. *United States, supra* at p. 23 (Emphasis added).

[12] *Stovall* v. *United States,* 388 U.S. at 301-302. In *Clemons* v. *United States, supra,* the Court did not find lack of due process in the identification procedures employed by the police against appellant Clark, when, lacking probable cause, they invited Clark to appear at the police station, thereby instigating a confrontation between Clark and the complainant. The Court there recognized that the police made no suggestive remarks to complainant to indicate they suspected Clark. At pp. 21-24.

that appellant came within two feet of Tanner (Tr. 12), and that Tanner saw appellant three times during the incident, each time getting a clear look at his face (Tr. 13-14).

II. Since no meritorious grounds existed for suppression of Tanner's in-court identification of appellant, appellant's counsel was not ineffective for not raising a motion to suppress the identification.

Appellant summarily claims that he was denied effective assistance of counsel by counsel's "failure to object to in-court identification testimony which should have been properly excluded under the Wade and Gilbert rules." [13] We think the claim is frivolous. Not only has appellant failed to carry his heavy burden of showing as he must that trial counsel's representation was so ineffective as to deny him a fair trial as viewed from the whole record,[14] but that the representation was ineffective at all. Counsel had no meritorious grounds, as argued above, for suppression of Tanner's in-court identification and could only attempt to discredit the reliability of Tanner's identification, which indeed he tried to do.

Furthermore, the record shows, as previously stated, that Tanner's opportunity to observe appellant at the scene of the crime was good, thereby indicating that counsel's decision not to contest appellant's in-court identification was sound.

III. The trial judge did not commit plain error when in the absence of a motion for severance he did not order one *sua sponte*.

(Tr. 7, 10-11, 44, 139-141, 148, 149-150)

Appellant urges this Court to reverse his conviction because the trial judge did not *sua sponte* order a severance

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[13] Appellant's brief, p. 4.

[14] *Harried* v. *United States*, 128 U.S. App. D.C. 330, 389 F.2d 281 (1967); *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958).

of the counts of the indictment. His claim that the joint trial seriously prejudiced him (See Rule 14, Fed. R. Crim. P.) is obviously an appellate afterthought because no motion for severance was ever made below.[15] A motion for a severance on the grounds of prejudice under Rule 14, Fed. R. Crim. P., is a motion addressed to the sound discretion of the trial judge and an appellate court can only reverse if there had been an abuse of that discretion. *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 210 F.2d 29 (1954). If that discretion is never invoked it cannot be abused.

Moreover, appellant suffered no prejudice from the joint trial, much less prejudice so severe as to make "plain error" of the District Court's failure to *sua sponte* sever the trial.[16] Appellant seeks to find the prejudice amounting to "plain error" in the joinder of the two counts by his claim that such joinder prejudiced the jury "by showing that an actual attack had been made on Shymanski," for which appellant was acquitted, making it "very likely" that the jury was prejudiced against him by such evidence, as to the alleged assault on Tanner, for which he

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[15] The initial joinder of the counts in one indictment is not challenged, and indeed it could not be. Rule 8(a), Fed. R. Crim. P. *Pointer* v. *United States*, 151 U.S. 396 (1894).

[16] Appellant also argues that his "trial and sentencing were conducted in a prejudicial atmosphere as indicated by statements from the court during the trial and at the sentencing." (Appellant's brief, p. 4). Although appellant is vague on the point, he apparently contends that such atmosphere adversely prejudiced the jury. We need only point out that the court's first remarks were made after the jury had returned its verdicts and had been dismissed from the courtroom (Tr. 148), and were spoken in reference to the matter of release for appellant pending appeal. (Tr. 149-150). The court's second remarks, at the time of sentencing, were comments reflecting the evidence the court had heard during the trial and were obviously made in reference to the sentence that the judge was about to impose. Such post-trial remarks, proper in their setting, cannot serve as a basis for a claim of court prejudice during the trial, which in some manner passed to the jury. The record is barren as to any unduly prejudicial remarks made by the court during the course of the jury trial.

Furthermore, appellant does not contend, nor can he, that the sentence imposed was illegal.

was found guilty. The crux of appellant's claim of prejudicial joinder appears to be his contention that there was "no real case" against him as to the attack on Shymanski, in that the Government failed to present a "prima facie" case.[17]

While appellant failed to raise any motion at trial for acquittal or for a directed verdict based on insufficiency of the evidence, it is clear from the record that the Government's case as to the assault on Shymanski would have withstood any such motions. Appellant was identified by two of the Government witnesses as being on the scene of the fray; Tanner saw him with a rock in his hand on two separate occasions (Tr. 7, 11); Shymanski saw appellant among a group standing over Captain Gates, who was on the ground, just seconds before Shymanski was struck on the head while coming to the aid of Gates (Tr. 44); and finally, seconds after Shymanski was struck, Tanner came to his assistance and saw appellant approaching him with an object in his hand, saying that he (appellant) would give to Tanner what he had given to his friend (Shymanski) (Tr. 10-11). Certainly such evidence was compelling enough that jurors could have found beyond a reasonable doubt that appellant had actually struck Shymanski.[18] Another basis for which the jury could have found appellant guilty for the assault on Shymanski was that of "aiding and abetting," a charge which was given by the court to the jury. (Tr. 139-141).

Thus, it is clear that no undue prejudice attached to appellant; on the contrary, appellant was obviously given the benefit of the doubt by the jury as to the charge of assault on Shymanski because no one saw appellant actually strike Shymanski. Now for the appellant to seize such fortuitous circumstances for use as a sword to attack his conviction for the assault on Tanner, based as it was

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[17] Appellant's brief, p. 7-8.

[18] *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332, (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

on the direct eyewitness testimony of Tanner, is incredible.

Furthermore, in view of Tanner's strong identification testimony, appellant's contention that "it is highly questionable" whether appellant would have been convicted of assault on Tanner, had no evidence concerning the assault on Shymanski been introduced at the trial, is sheer speculation. At any rate, had appellant been tried separately on the charge of assault with a dangerous weapon as against Tanner, evidence concerning the assault on Shymanski would certainly have been admissible as an integral part of the circumstances surrounding the assault on Tanner.[19] This being the case, appellant can show no prejudice to warrant relief under Rule 14.[20]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[19] *Drew* v. *United States*, 118 U.S. App. D.C. 11, 16, 331 F.2d 85, 90 (1964).

[20] *Baker* v. *United States*, —— U.S. App. D.C. ——, 401 F.2d 958, 974, 975 (1968); *Blunt* v. *United States*, No. 20,956, October 2, 1968 (slip op., p. 8-9).

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